UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

PORTIA JOY SMITH PAYNE,	)	
	)	
Plaintiff,	)	Case No. 2:01CV00046
	)	
v.	)	**OPINION**
	)	
GENERAL MOTORS CORPORATION,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

John H. Qualls, Gate City, Virginia, for Plaintiff; Brian K. Telfair and Ronald C. Wernette, Jr., Bowman and Brooke LLP, Richmond, Virginia and Detroit, Michigan, for Defendant.

In this products liability case involving an alleged defective automobile air bag, the defendant automobile manufacturer has filed both a motion in limine to exclude the testimony of plaintiff's expert and a motion for summary judgment. Although I believe that the defendant's argument with respect to the expert's testimony has merit, I need not rule on the motion in limine because I will grant summary judgment in favor of the defendant. I find that the plaintiff has failed to establish a prima facie case because she cannot identify a specific defect in the vehicle's air bag system, nor does the record reveal any evidence that any defect existed at the time the vehicle left the control of the manufacturer.

I. FACTS.

The essential facts of the case, recited in the light most favorable to the plaintiff on the present record, are as follows.

The plaintiff, Portia Joy Payne Lane,[1] was the first owner of a new 1996 Chevrolet Cavalier, manufactured by the defendant General Motors, which she purchased in June 1996. On April 16, 1998, in the early evening hours,[2] Payne was driving the vehicle on a highway in Scott County, Virginia, during a severe rainstorm. She drove through a heavy concentration of water, causing her to hydroplane. Payne recalls that the vehicle spun twice before she veered off the right side of the road and struck a drain tile. When she exited her car, the vehicle was "full of water," which had soaked the floorboards and had risen to touch the underside of the dashboard. (Payne Dep. at 41, 49-50.) The police officer responding to the scene estimated Payne's driving speed at thirty-five miles per hour, which the officer indicated was the maximum safe speed for the road and weather conditions at the time of the accident, despite a posted fifty-five mile per hour limit. Payne was wearing her seatbelt when

[1] The plaintiff was previously married to Kevin Smith and at the time this case was filed, she retained the name Portia Payne Smith. On May 27, 2001, she married Richard Lane and changed her name to Portia Payne Lane. For purposes of this opinion, the court will refer to the plaintiff by her maiden name, Payne.

[2] The plaintiff estimates the time of the accident to have been between 6:00 p.m. and 7:30 p.m. The time noted on the police accident report is 7:55 p.m.

the accident occurred. The vehicle's air bags did not deploy; however, the air bag warning light on the instrument panel was illuminated after the accident. Payne does not believe that her upper body struck the steering wheel, although she remembers being thrown forward. She sustained a bruise from the force of the seatbelt, and following the accident she suffered low back pain, cervical strain, whiplash and muscle spasms in her neck.

Photographs were taken of the vehicle after the accident, but the vehicle was repaired before an inspection could be performed by either the defendant or the plaintiff's expert, Michael D. Leshner. Nevertheless, Leshner studied the police accident report, repair invoices, and vehicle photographs, among other things, and concluded that the severity of the crash was sufficient to deploy the air bags. He also opines that because the air bag light on the instrument panel was illuminated following the collision, there had been a malfunction in the air bag system. He believes the plaintiff's injuries were aggravated because the air bags did not deploy.

Payne filed a motion for judgment in the Circuit Court of Scott County, Virginia, on April 14, 2000, alleging negligence and breach of warranties by General Motors for defective design, manufacture, or assembly of the plaintiff's automobile. She claims that a defect in the air bag system resulted in its failure to deploy during the accident, causing her to suffer severe injuries. After service on General Motors, the case was

removed to this court on April 27, 2001.[3] Following discovery, General Motors filed the present motion in limine to exclude Leshner's testimony, as well as a motion for summary judgment. These motions have been briefed and are ripe for decision.[4]

II. MOTION IN LIMINE.

General Motors argues that Leshner is not qualified to give expert opinion testimony about the design, manufacture, or assembly of an air bag system. It draws attention to Leshner's lack of experience with supplemental inflatable restraint ("SIR" or air bag) systems in general, and his failure to research adequately the factual specifics of this case. Leshner has never been involved with the testing of SIR systems, nor has he ever participated in the design, manufacture, or assembly of air bags or their components. He did not study any crash tests for the 1996 Cavalier to evaluate SIR performance or design in the context of this case. He has never published any papers relating to air bag systems. More importantly, he did not inspect the subject vehicle in this case or examine any of its component parts; he did not study any diagrams or engineering drawings of the vehicle; he did not visit the crash scene; he did not speak

[3] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2001).

[4] I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

to the plaintiff or read her deposition transcripts; and he did not interview any crash witnesses or the responding state trooper.

Leshner bases his expertise on his training with solid propellant systems as they relate to rockets, which are similar to the systems that inflate air bags. He admits that the bulk of his experience is the result of his work as a consulting engineer, which has afforded him the opportunity to investigate many automobile collisions, some of which involved the malfunctioning of air bag systems. He has also studied manuals provided by automobile companies and read technical papers focusing on the design and functioning of air bag systems.

General Motors requests that the court disqualify Leshner's technical testimony based on Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In that case, the Supreme Court held that the trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. This basic gatekeeping function applies to all expert testimony, including the technical testimony of engineers. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). General Motors asserts that Leshner is not qualified to render an expert opinion about the functioning of SIR systems because he lacks the education, training, and experience related to the design, assembly, and manufacture of such systems. Added to this, Leshner lacks knowledge of the specific

facts of this automobile accident, as his opinion is based on little other than the photographs of the vehicle at issue. Leshner presents National Highway Traffic Safety Administration ("NHTSA") reports of complaints involving the nondeployment of air bags in other Chevrolet Cavaliers and its twin, the Pontiac Sunbird, in support of his conclusions. General Motors asserts that this foundation for an opinion is unreliable because Leshner failed to perform any investigation as to the facts or circumstances of those complaints. Furthermore, General Motors claims, Leshner's opinion regarding the air bag illumination light should be barred because Leshner cannot provide a knowledgeable explanation for his theory.

General Motors asks the court to focus on *Wood v. Toyota Motor Corp.*, 760 A.2d 315 (Md. Ct. Spec. App. 2000), an air bag case in which Leshner was the plaintiff's designated expert. Leshner was prepared to express his opinion that the vent holes and the folding pattern of the air bag in a 1993 Toyota Tercel constituted defects due to the likelihood that the hazardous materials exiting the bag would come in contact with the driver's face. *See id*. at 317 n.3. The trial judge decided that Leshner was not even "minimally qualified" and that his opinions did not have the requisite factual basis to warrant the admission of his testimony. *Id*. at 319. The appellate court, in reviewing the decision, noted that:

> Mr. Leshner has never been accepted as an expert witness in a trial involving air bag design. His knowledge of air bags was mostly (if not entirely) derived from his employment as a litigation consultant. He is not a medical doctor and has no medical training. He does not have any "hands on" experience relating to air bag technology, and none of the courses he has taken involved "air bag design, manufacture or assembly."

Id. at 320. The court held that the trial judge did not abuse her discretion in concluding that Leshner was not qualified to express the proffered opinion. *See id*. It also upheld the trial judge's determination that there was an inadequate factual basis for Leshner's opinion, *see id.* at 321, and that he failed to offer sufficient explanation for his conclusions, *see id.* at 322.

General Motors also requests that the court exclude Leshner's conclusions regarding the plaintiff's injuries. Leshner's investigation report states his opinion that "[i]f the air bags had deployed in the subject collision, the severity of Ms. [Payne's] injuries probably would have been reduced" and "Ms.[Payne's] injuries were aggravated in this collision because the air bags failed to deploy." (Mot. in Limine to Exclude Testimony Ex. C at 4.) General Motors asserts that because Leshner is not a medical doctor, he is not qualified to render an opinion as to the cause of the injuries sustained by Payne. *See Combs v. Norfolk & Western Ry.*, 507 S.E.2d 355, 358-59 (Va. 1998) (holding that biomechanical engineer not qualified to state an expert medical opinion).

While I believe that the defendant's motion to exclude the expert's testimony has merit, I prefer to rest my dispositive decision on the motion for summary judgment.

III. MOTION FOR SUMMARY JUDGMENT.

General Motors moves the court for summary judgment because Payne cannot establish what the specific defect is and when it occurred. *See Logan v. Montgomery Ward*, 219 S.E.2d 685, 687 (Va. 1975) (holding that mere fact of explosion does not prove that stove was defective or that manufacturer was negligent). Payne's expert admitted that he cannot identify any specific defect in the air bag system.[5] He opines that because the air bag light was illuminated after the accident, there was a malfunction in the SIR system. Leshner states in his report that the air bag light comes on when a system defect is detected by the module. Leshner concludes that there are

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[5] When asked whether the "malfunction" in the air bag system related to its design, assembly or manufacture, Leshner responded:

> Without the detailed evidence, which, it could have been any of the links in the chain. As you pointed out it could be the sensor, could be the wiring, could be the module. The post collision data indicate there was a failure in the system, so I don't think there's enough evidence to tell whether it was the module, the manufacturing of the module, the installation of the module, calibration of the module. There is certainly evidence there were calibration problems with that module. But in this case I don't think I can tell you whether it was a calibration or some other kind of malfunction. I do believe that the module malfunctioned.

(Leshner Dep. at 77-78.)

only two possible explanations for the illumination of the air bag light in these circumstances:

> 1. The air bag system was malfunctioning before the collision, which would explain why the air bags failed to deploy, or;
>
> 2. The air bags [sic] deployment sequence was initiated during the collision, but the air bags failed to deploy due to a malfunction.

(Mot. in Limine to Exclude Testimony Ex. C at 3.) The plaintiff also relies on the warning light evidence to support her theory that the air bag system was defective at the time the vehicle left General Motors' control. She argues that the failure of the light to illuminate prior to the accident establishes that the car left the manufacturer in the same condition as it was in at the time of the collision.

General Motors' expert, Jack Yee, has identified two alternative reasons for the illumination of the air bag warning lamp: (1) water entering the vehicle after the crash flooded the module, and (2) the air bag sensor was damaged during the accident. Both of these explanations contradict Leshner's opinion that there was a defect in the SIR system prior to the accident. In sum, General Motors argues that Leshner's opinion is conclusory and speculative and does not address whether the plaintiff's vehicle was unreasonably dangerous or whether it was defective when it left General Motors' hands.

IV. ANALYSIS.

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

I believe that the plaintiff's claims have no factual basis. Even assuming that Leshner's testimony is admissible under Federal Rule of Evidence 702, I am of the opinion that his general conclusion that there was a malfunction in the air bag system is not sufficient to meet the plaintiff's burden. Under Virginia law, which the parties

are agreed must be applied in this case,[6] a plaintiff asserting a products liability claim based on breach of warranty or negligence must prove two elements: "(1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands." *Logan*, 219 S.E.2d at 687; *see also Wilder v. Toyota Motor Sales, U.S.A., Inc.*, No. 01-1104, 2001 WL 1602043, at *1 (4th Cir. Dec. 17, 2001) (unpublished) (applying Virginia law). Payne cannot overcome this prima facie hurdle because she has not shown a specific defect in the SIR system, nor has she given adequate proof that the vehicle left General Motors' hands in a defective condition.

With respect to the first element, the plaintiff must present direct evidence of a specific defect.[7] *See Logan*, 219 S.E.2d at 687-88. Leshner's theory about the air bag warning light certainly does not demonstrate that the vehicle was unreasonably

[6] A federal court exercising diversity jurisdiction must apply the law of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

[7] The claims alleged in *Silvestri v. General Motors Corp.*, 210 F.3d 240 (4th Cir. 2000) are almost identical to those of this case. The trial judge awarded summary judgment to the defendant, holding that Silvestri's air bag expert could not offer competent testimony to establish a prima facie case. *See id*. at 241. The Fourth Circuit vacated the decision, ruling that the experts' opinions created a triable question of fact. *See id*. at 245. However, *Silvestri* is inapposite because the court applied New York law, which does not require a products liability plaintiff to present direct evidence of a product defect. *See id*. at 241-42. Rather, a plaintiff need only show that the product did not perform as intended. *See id.* at 244. Virginia law is quite different.

dangerous. He cannot point to any specific defect in the SIR system that may have caused the air bag light to illuminate, whereas the defendant's expert lists two reasons why the light may have been triggered in the absence of a defect in the system. The mere fact that the light came on following the accident does not prove there was a defect, nor does it show what the defect was or how the defect occurred. *See Wilder*, 2001 WL 1602043, at *2 (stating that failure of air bag to deploy after hitting tree, but deploying instead after vehicle came to stop, is not adequate evidence of a product defect). Leshner's opinion is purely speculative; he makes an assumption without any basis in fact. He never explains his theory or provides any scientific evidence to support his conclusions. He can offer nothing to the jury other than conjecture, upon which a verdict cannot be based. *See Wood*, 760 A.2d at 321-22.

Furthermore, even if Payne could show a specific defect, there is no evidence to suggest that the alleged malfunction existed when the vehicle left the defendant's hands. Again, Payne relies on the fact that the warning light remained unlit from the time she purchased the vehicle until after the accident, indicating, in her opinion, that the defect in the system was present from the date of the vehicle's manufacture. Had a malfunction in the air bags occurred after her purchase, she contends, the warning light would have illuminated at that time. As previously stated, I find the warning light evidence to be inconclusive and subject to several alternative explanations. It is just

as logical to assume that the warning light did not illuminate prior to the accident because there was never any defect or malfunction in the system. The plaintiff's expert, as explained before, does not offer any technical explanation or scientific evidence to support his theory of events, providing nothing that would give a reasonable jury cause to believe that a defect existed in the air bag system when it left the control of General Motors. *See Wilder*, 2001 WL 1602043, at *3.

Assessing the factual evidence in the light most favorable to the plaintiff, I find that Payne has failed to establish the existence of the elements essential to her case. Thus, I will award summary judgment in favor of the defendant. In light of this decision, I need not rule on the defendant's motion in limine to exclude the testimony of plaintiff's expert.[8]

DATED: March 21, 2002

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United States District Judge

[8] The defendant earlier filed a number of other pretrial motions, including a motion to dismiss based on spoliation because the automobile was repaired before General Motors had notice of the claim. *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 590-95 (4th Cir. 2001) (affirming dismissal of defective air bag action because of spoliation). However, it is not necessary for me to reach a decision on these other motions.